Supreme Court, U. S.
FILED
DEC 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

1975 TERM

No. 75-76

STATE OF SOUTH DAKOTA,

Petitioner,

vs.

DONALD OPPERMAN,

Respondent.

BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATE OF INDIANA

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The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, and Donald P. Bogard, Executive Assistant Attorney General, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, submits its *amicus curiae* brief on the merits in support of the Petitioner in the above-entitled cause.

OPINION BELOW

The opinion of the Supreme Court of South Dakota is reported as *State of South Dakota v. Opperman,* (S.D. 1975) 228 N.W. 2d 152, and may be found as Appendix A attached to the Petition for Writ of Certiorari.

JURISDICTION

This Court has jurisdiction to review this cause by writ of certiorari pursuant to 28 U.S.C. §1257 (3), and has accepted it for such purposes by granting said writ on November 3, 1975.

CONSENT OF THE PARTIES

The *amicus curiae* brief is filed by the State of Indiana pursuant to Rule 42 of the Rules of this Court and consent of the parties is not required pursuant to Rule 42 (4).

QUESTION PRESENTED

Whether the South Dakota Supreme Court erred in holding that certain evidence found in the glove compartment of a vehicle during a lawful inventory of the contents of the vehicle by police, which inventory followed the impoundment of the vehicle for parking violations, was inadmissible on the ground that the inventory was an illegal search under the Fourth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

INTEREST OF THE AMICUS

The State of Indiana submits this brief since the question presented by the State of South Dakota is equally vital to Indiana and all other states in the Union. The decision of the Supreme Court of South Dakota on the question presented is contrary to the weight of authority from this Court.

This case involves the attempted exclusion of evidence in a state court proceeding. The evidence was obtained during an inventory of the items in a vehicle that had been lawfully towed to the impounding lot of the City of Vermillion, South Dakota, following multiple parking violations. The trial court held that the evidence was admissible but the Supreme Court of South Dakota reversed.

If the decision of the Supreme Court of South Dakota is affirmed by this Court, then the various police agencies in Indiana would be seriously hampered in their ability to protect the safekeeping of items of property contained in vehicles under their control, and in their ability to protect themselves from claims arising from allegations of loss of items contained in those vehicles.

STATEMENT OF THE CASE

The *amicus* accepts and adopts the "Statement of the Case" contained in Petitioner's brief on the merits.

ARGUMENT

EVIDENCE FOUND IN THE GLOVE COMPARTMENT OF A VEHICLE DURING A LAWFUL INVENTORY OF THE CONTENTS OF THE VEHICLE BY POLICE FOLLOWING IMPOUNDMENT OF THE VEHICLE FOR PARKING VIOLATIONS IS ADMISSIBLE AND IS NOT EVIDENCE OBTAINED BY AN ILLEGAL SEARCH IN VIOLATION OF THE FOURTH AMENDMENT.

This review arose from the case of *State of South Dakota v. Opperman, supra,* wherein the Supreme Court of South Dakota held that an inventory of items in a vehicle impounded for parking violations was an unreasonable search under the Fourth Amendment, and that evidence thus obtained must be excluded from a criminal prosecution. 228 N.W. 2d at 159.

In this case the Vermillion, South Dakota, City Police observed the Respondent's automobile parked, during the early morning hours, in a zone where parking was prohibited by city ordinance at that time of day. Approximately seven hours later the automobile was again ticketed by Police for an expired parking meter violation. The vehicle was reported to the Police Station, and after investigation by Officer Frank from the station, it was towed to the city impounding lot.

The impounding lot had been the scene of past incidents of theft from locked automobiles, and Officer Frank, observing a watch and numerous other items inside the car, inventoried the contents pursuant to standard police

department procedure. During the inventory Officer Frank opened the unlocked glove compartment and discovered a small quantity of marijuana.

At 5:00 P.M. the same day, the Respondent, who was the registered owner of the vehicle, appeared at the Police Station and claimed the items that were not seized. He was arrested ten days later and charged with possession of less than one ounce of marijuana. Upon conviction of that offense he appealed to the Supreme Court of South Dakota, which reversed the trial court.

It is well settled that the reasonableness of any search must be determined on a case by case basis, examining the specific facts therein. *Preston v. United States,* 376 U.S. 364 (1964). Although this Court has not ruled on the precise question presented herein, the *Amicus* submits that the decisions of this Court, and the facts in this case, clearly reveal that the Supreme Court of South Dakota erred in its decision.

In *Preston v. United States, supra,* this Court stated at pages 366 and 367:

> "... Our cases make it clear that searches of motorcars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible. E.g., Carroll v. United States, 267 U.S. 132 (1925); Brinegar v. United States, 338 U.S. 160 (1949). Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motorcar. See Carroll v. United States, supra, 267 U.S., at 153. *But even in the case of motorcars, the test still is, was the search unreasonable.*" (Emphasis supplied.)

This case centers around a standard police operating procedure—the inventory of articles contained in an impounded automobile. There was no assertion by the Respondent herein that the procedure was extraordinary for the Vermillion Police Department. Likewise, in holding the inventory an "unreasonable search," the Supreme Court of South Dakota did not conclude that the inventory procedure was anything other than standard, departmental procedure.

In *Cady v. Dombrowski*, 413 U.S. 433 (1973), the respondent, an off-duty Chicago police officer, wrecked a rented Thunderbird. The respondent appeared drunk, so the local police had the vehicle towed to a garage. Unable to find the respondent's service revolver which the local police believed the respondent was required to wear at all times, the police searched the automobile, including the locked trunk, wherein they found several bloody items which later led to the respondent's arrest for murder. This Court stated at pages 446 and 447:

> ". . . The Thunderbird was not parked adjacent to the dwelling place of the owner as in Coolidge v. New Hampshire, 403 U.S. 443, (1971), nor simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and there is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure."

In further commenting on the duties and functions of local police which are deemed "sound police procedure," this Court stated at page 441:

> ". . . Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

And further, at page 443:

> ". . . Particularly in nonmetropolitan jurisdictions such as those involved here, enforcement of the traffic laws and supervision of vehicle traffic may be a large part of a police officer's job. We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss' specific motivation and the fact that the procedure he followed was 'standard.'"

The Supreme Court of South Dakota attempted to minimize the importance of *Cady* by stating that "vast factual distinctions separated the case at bar from Cady." 228 N.W.2d at 157. However, in attempting to distinguish the facts, the *Amicus* asserts that that Court drew distinctions where none in fact existed. For example, the Court stated that the Respondent's automobile was not located where it was a public nuisance. The record clearly shows that the vehicle was parked in a prohibited zone although the state Supreme Court said that the car was parked in a "designated parking space." 228 N.W.2d at 157. Clearly, an automobile parked in a zone in which the City of Vermillion prohibited parking was a "public nuisance."

In addition, that state court stated:

> ". . . The record offers no reasons why petitioner [Respondent herein] could not arrange for the safekeeping of his vehicle *at the time or after it was towed from where it had been parked.*" (Emphasis supplied.) 228 N.W.2d at 157.

The record shows that the Respondent abandoned his automobile and did not claim it for at least fourteen hours after it was initially ticketed. It was certainly not incumbent upon the Vermillion Police Department to leave the vehicle where it was and search out the owner to see if he would move the vehicle. Even if the Respondent had had difficulty starting the auto during the early morning hours, it was still abandoned in mid-morning when it was reticketed at 10:00 A.M. and then towed away sometime subsequent to further investigation by Officer Frank.

The Supreme Court of South Dakota further "distinguishes" *Cady* by stating:

> ". . . most importantly, there was no reason for the Vermillion police to believe that the car contained anything which posed a potential threat to the public safety." 228 N.W.2d at 157.

That Court had absolutely no difficulty in accepting a search in *Cady* for a revolver that *never* was shown to exist. In fact, the only justification for the search in *Cady* was that the Kewaskum, Wisconsin policemen "believed" that the Chicago policeman was required to wear his service revolver at all times. 228 N.W.2d at 157.

Here, the Vermillion police were simply inventorying all items in the vehicle to protect all of the property of the Respondent from being stolen from a lot that had been the site of previous thefts from other impounded, locked automobiles, as well as to protect themselves from claims arising from any such thefts. The police did not unlock the glove compartment, but merely opened the lid. If the vehicle had been the object of a theft surely the thieves would not have stopped their efforts if the glove compartment lid was shut and unlocked. Thus the *Amicus* would

submit that the conduct of the Vermillion police was imminently reasonable under the circumstances.

In the case of *Harris v. United States,* 390 U.S. 234, 235 (1968):

> "Petitioner's automobile had been seen leaving the site of a robbery. The car was traced and petitioner was arrested as he was entering it, near his home . . ."

A cursory search was made of the car at that time, the petitioner was taken to the police station and the automobile impounded, arriving at the station over an hour after the petitioner. A regulation of the Police Department required the officer impounding the vehicle *"to search the vehicle thoroughly, to remove all valuables from it . . ."* (Emphasis supplied.) During this examination of the vehicle a registration card was discovered in plain view.

This Court stated in *Harris,* at page 236:

> "The sole question for our consideration is whether the officer discovered the registration card by means of an illegal search. We hold that he did not . . . The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances."

In the instant case, the Supreme Court of South Dakota limits *Harris* to the "plain view" exception to the requirement of a warrant. 228 N.W.2d at 158. However, in *Cady v. Dombrowski, supra,* at pages 441 and 442, this Court cited *Harris* and *Cooper v. California,* 386 U.S. 58 (1967), as authority for the statement that:

> ". . . warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent."

and cited the case of *United States v. Biswell,* 406 U.S. 311 (1972) as authority for the "plain view" search.

In *Cooper v. California, supra,* the petitioner was convicted of selling heroin to a police informer, and part of the evidence was seized by police, without a warrant, from the glove compartment of petitioner's impounded car one week after his arrest. Justice Black, for the Court, stated at page 61:

> ". . . But the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one. While it is true, as the lower court said, the "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it," *ibid.*, the reason for and the nature of the custody may constitutionally justify the search . . ."

While this case is not *Cooper* in that the vehicle herein was not required to be forfeited under state law, the cases are quite similar in that the evidence was discovered during inventories of the vehicles. The reasonableness of the search herein is even more evident when compared to the search in *Cooper* which was made one full week after the owner was arrested on narcotics charges.

The *Amicus* would submit that the inventory herein was entirely proper as standard police procedure, and is legally

supported by *Cady v. Dombrowski, supra, Harris v. United States, supra* and *Cooper v. California, supra.* The *Amicus* does not believe that the inventory herein was a search, *Harris v. United States, supra,* at page 236. But even if it is deemed to be a search, the inventory was reasonable as required by the Fourth Amendment, and the decision of the Supreme Court of South Dakota must be reversed.

CONCLUSION

For all the foregoing, the *Amicus* respectfully prays this Court reverse the decision of the Supreme Court of South Dakota.

Respectfully submitted,

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